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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Section)
309(j) of the Communications)
Act - Competitive Bidding) PP Docket No. 93-253
)
Amendment of the Commission's) GN Docket No. 90-314
Cellular PCS Cross-Ownership Rule)
)
Implementation of Section 3(n))
and 332 of the Communications Act) GN Docket No. 93-252
Regulatory Treatment of Mobile)
Services)

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COMMENT OF GILES TELEVISION, INC.

Giles Television, Inc. ("Giles"), is a minority-owned entity desirous of obtaining an interest in one or more PCS licenses. Giles hereby files comments in the above-captioned proceeding objecting to the Commission's tentative conclusion to proceed with the C block PCS auctions without ensuring that minorities and women may obtain PCS licenses, in violation of Section 309(j) of the Communications Act. Giles' concern with the issue of minority participation in the communications industry is evidenced by its filing of an amicus curiae brief with the Supreme Court in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

In its Further Notice of Proposed Rulemaking ("FNPRM")¹

¹ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Amendment of the Commission's Cellular PCS Cross-Ownership Rule, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory

in the above-captioned proceedings, the Commission tentatively concluded that it will "eliminate race- and gender- based measures" in the C block PCS auction, including an installment payment plan, a control group equity structure, exceptions to the affiliation rules, bidding credits, a cellular-PCS spectrum cap, and a CMRS spectrum aggregation limit.² The Commission claims that under Supreme Court's decision in Adarand Constructors, Inc. v. Peña,³ its regulations will not meet the "strict scrutiny" test. The Commission has therefore tentatively concluded that it will proceed with the C block auction without any race or gender based measures in its regulations.

By eliminating all measures directed at minorities and women from the C block auction regulations, the Commission is failing to abide by the clearly expressed intent of Congress in Section 309(j) of the Communications Act of 1934 ("the Act"):

(3) Design of systems of competitive bidding

* * * *

In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the

Treatment of Mobile Services (Further Notice of Proposed Rulemaking), PP Docket No. 93-253, GN Docket No. 90-314, GN Docket No. 93-252 (FCC 95-263) (released June 23, 1995) [hereinafter FNPRM].

² FNPRM at ¶ 3.

³ 63 U.S.L.W. 4523 (U.S. June 12, 1995)

methodologies for use under this subsection, the Commission . . . shall seek to promote . . . the following objectives: . . .

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(4) Contents of Regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall--

(C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote . . . (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women . . .

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures . . .

47 U.S.C. § 309(j)(3) and (4).

When it originally proposed its regulations governing the treatment of designated entities, the Commission cited the provisions of Section 309(j) in support of its race and gender based measures.⁴ The Commission stated that it "construed

⁴ See, e.g., Implementation of Section 309(j) of the Communications Act - Competitive Bidding (Fifth Memorandum Opinion and Order), PP Docket No. 93-253, 10 F.C.C.R. 403, 404 (1994) [hereinafter Fifth MO&O]; Implementation of Section

this Congressional directive as a mandate that we take steps that are necessary to ensure that designated entities have a realistic opportunity to obtain broadband PCS licenses."⁵ The Commission also cited several studies that attested, through stark statistics, to the enormous hurdles faced by minorities in raising capital, and the tiny proportion of the telecommunications industry that constitutes entities owned by women and minorities.⁶

Unfortunately, the Commission has apparently decided to abandon its original efforts to assist women and minorities, despite the clear language of Section 309(j) of the Act. In effect, the Commission, in the FNPRM, has unilaterally determined, albeit on a preliminary basis, that it will not attempt to comply with the mandate of Congress. Rather than making the requisite examination and findings that its current gender and race based rules meet the strict scrutiny test, or creating new regulations that would meet the strict scrutiny test, the Commission is simply taking the easy and unauthorized route out and proceeding with the C block auctions.

In its tentative conclusion to avoid compliance with Section 309(j) of the Act, the Commission is failing in its

309(j) of the Communications Act - Competitive Bidding (Fifth Memorandum Opinion and Order) PP Docket No. 93-253, 9 F.C.C.R. 5532, 5571-72 (1994) [hereinafter Fifth R&O].

⁵ Fifth R&O, 9 F.C.C.R. at 5537.

⁶ See Fifth R&O, 9 F.C.C.R. at 5574-78.

mandate to make licenses available to a "wide variety" of applicants, including minorities and women. By holding the C block auctions without adequately "consider[ing] the use of . . . bidding preferences[] and other procedures," 47 U.S.C. § 309(j)(4)(D), the Commission is shutting the door to many minorities and women who wished to obtain 30 MHz PCS licenses. The C block is the only 30 MHz PCS block remaining to be auctioned.

Giles also disagrees that delay of the C block auctions to amend the regulations in order to comply with Adarand would cause more harm to minority and women PCS applicants than the Commission's proposed course of action. Giles is aware of the collapse of several financial arrangements between minority and women owned entities and their financial partners in the wake of the Commission's tentative conclusion. Due to the Commission's decision, the economic opportunities assured by Section 309(j) of the Act are no longer a reality for many minorities and women who are seeking a niche in the telecommunications industry.

For the reasons stated above, Giles believes that the Commission's tentative determination to eliminate entirely race and gender based measures in its C block auction regulations is not in the public interest and is in violation

of the express language of Section 309(j) of the
Communications Act.

Respectfully submitted,

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July 7, 1995